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No. 82-1873

In the Supreme Court of the United States

OCTOBER TERM, 1983

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALFONZO L. DOWELL, ET UX.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Badaracco v. *Commissioner*, cert. granted, No. 82-1453 (May 16, 1983) 1, 6, 8
Baumer v. *United States*, 685 F.2d 1318 7
Cory v. *Commissioner*, 29 T.C. 903, aff'd, 261 F.2d 702 6
Crews v. *Commissioner*, 120 F.2d 749, cert. denied, 314 U.S. 664 5
Deleet Merchandising Corp. v. *United States*, cert. granted, No. 82-1509 (May 16, 1983) 1, 6, 8
Federal Trade Commission v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 7
Ford v. *United States*, 618 F.2d 357 3
Heard v. *Commissioner*, 285 F.2d 352 5
Helvering v. *Northern Coal Co.*, 293 U.S. 191 5
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 409 U.S. 363 6
Lasky v. *Commissioner*, 235 F.2d 97, aff'd, 352 U.S. 1027 5
McGah v. *Commissioner*, 210 F.2d 769 5
Norton v. *Mathews*, 427 U.S. 524 6
R. Simpson & Co. v. *Commissioner*, 321 U.S. 225 5
Secretary of the Navy v. *Avrech*, 418 U.S. 676 6
Seiberling Rubber Co. v. *United States*, 297 F.2d 842, cert. dismissed, 371 U.S. 801 5
Toledano v. *Commissioner*, 403 F.2d 218 5
United States v. *Augenblick*, 393 U.S. 348 5-6
Urie v. *Thompson*, 337 U.S. 163 7
Virginia Lincoln Furniture Corp. v. *Commissioner*, 67 F.2d 8 5

Statutes and rules:

Internal Revenue Code of 1954, 26 U.S.C. (& Supp. V):
- Section 6501 6
- Section 6501(a) 2, 6
- Section 6501(c)(1) 2
- Section 6512(b) (Supp. V) 2
- Section 6512(b)(2) (& Supp. V) 3

Statutes and rules—Continued:

	Page
Section 7481	3, 6
Section 7481(a)(2)	4
Section 7481(a)(3)	2, 4, 5
Section 7481(a)(3)(B)	3, 4
Section 7481(a)(3)(B)(iii)	4
Section 7481(a)(4)	3, 4, 5
Section 7483	4
28 U.S.C. 1254(1)	5
Fed. R. Civ. P.:	
Rule 25(a)	1
Rule 54(b)	7

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In their brief in opposition to the petition in this case, respondents [1] do not deny that the issue decided by the court of appeals in the first appeal herein is precisely the same as that presented by the petitions for writs of certiorari in *Badaracco* v. *Commissioner*, No. 82-1453 and *Deleet Merchandising Corp.* v. *United States*, No. 82-1509, which were granted on May 16, 1983. Nevertheless, they oppose the petition on the following jurisdictional grounds: (1) contrary to their position in the court below, the decision of the Tax Court on remand in this case had become final

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[1] Respondents advise (Br. in Opp. 2 n.1) that respondent Vivian T. Dowell died on December 27, 1981. The successors or representatives of the deceased have not been identified. Cf. Fed. R. Civ. P. 25(a).

and nonreviewable under Section 7481(a)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) prior to the time they filed their notice of appeal from that decision, and (2) the failure of the Commissioner to seek certiorari within 90 days of the first decision of the court of appeals precludes him from now seeking review of any issues that were resolved in the first appeal. Neither contention is meritorious.

1a. The court of appeals, in its first decision in this case, held that, notwithstanding the filing by respondents of false and fraudulent returns for the years in question, the Commissioner could not rely upon the unlimited assessment period provided in Section 6501(c)(1) of the 1954 Code, but instead was required under Section 6501(a) to act within three years of respondents' later filing of nonfraudulent amended returns. Accordingly, it reversed the contrary decision of the Tax Court and remanded the case for further proceedings in accordance with its opinion (Pet. App. 33a). On remand, respondents reasserted, and the Tax Court considered, their further claim that they were entitled not only to a decision of no deficiency, but also to an "overpayment" determination under Section 6512(b) of the 1954 Code with respect to the amounts they had remitted with their amended returns.[2] The Tax Court concluded that "payment" occurred when the funds were remitted with the amended returns (rather than when the amounts were later assessed by the Commissioner). Accordingly, the court held that it lacked jurisdiction to make an overpayment determination

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[2] The Tax Court's original decision, holding that the unlimited assessment period provided in Section 6501(c)(1) applied in this case, made it unnecessary for the court to reach respondents' "overpayment" claim at that time.

under Section 6512(b)(2), since a refund claim could not have been timely filed at the time the petition for a redetermination of the deficiencies was filed in that court (Pet. App. 12a-20a).

Within 90 days (but more than 30 days) after the Tax Court denied respondents' motion for reconsideration of its decision on their overpayment claim, respondents filed a notice of appeal from that decision.[3] In the court of appeals, the Commissioner argued that the appeal should be dismissed for lack of jurisdiction on the ground that the notice of appeal should have been filed within the 30-day period specified by Section 7481(a)(3)(B) of the 1954 Code. The court of appeals, however, agreed with the position then urged by respondents that this case fell, instead, within the scope of the provisions of Section 7481(a)(4), which provide for 90 days within which to file notice of appeal (Pet. App. 25a-26a). Accordingly, it proceeded to decide the case on the merits (*id.* at 26a-32a).[4]

b. The finality of a decision of the Tax Court is governed by Section 7481 of the 1954 Code, which sets forth a series of rules applicable to the various situations in which review is (or is not) sought in a

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[3] The decision after remand was entered on November 25, 1980. Respondents' motion for reconsideration was filed on December 18, 1980, and denied by the Tax Court on December 22, 1980. The notice of appeal was filed on February 20, 1981.

[4] The decision in favor of the Commissioner on the issue of when payment is made for purposes of Section 6512(b)(2) is in apparent conflict with the decision of the Fifth Circuit in *Ford* v. *United States*, 618 F.2d 357 (1980). Respondents, however, have not filed a cross-petition seeking review of that issue in this case.

court of appeals or in this Court. Under Section 7481 (a) (3) (B) (iii), if a decision is "modified or reversed" on appeal, the new decision entered on remand becomes final "on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate * * *." Under Section 7481 (a) (4), if the case is remanded for a "rehearing," the new decision entered on remand "shall become final in the same manner as though no prior decision of the Tax Court has been rendered," which is the normal 90-day appeal period specified in Section 7483 of the 1954 Code.[5]

As the court of appeals observed (Pet. App. 25a), the instant case involves a "hybrid" situation that does not fall squarely within the literal terms of either Section 7481 (a) (3) (B) or Section 7481 (a) (4). The court of appeals' decision that the latter provision should control is thus not clearly contrary to the language of the statute. Moreover, it is consistent with the pertinent decisional authority. As the court below noted (Pet. App. 25a), the prior cases in which the 30-day provisions of Section 7481 (a) (3) and its statutory predecessors were applied appear to have been cases in which the Tax Court was required to do nothing more than the ministerial task of recomputing the deficiencies in accordance with the court of appeals'

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[5] Where the decision is affirmed on appeal, it is final (1) on the expiration of the time for filing a petition for a writ of certiorari, if none is filed, (2) on the denial of a timely filed petition for a writ of certiorari, or (3) on the expiration of 30 days from the date of issuance of this Court's mandate if it grants a petition and affirms or dismisses the appeal. 26 U.S.C. 7481 (a) (2).

decision. See *Toledano* v. *Commissioner*, 403 F.2d 218 (5th Cir. 1968); *Heard* v. *Commissioner*, 285 F.2d 352 (3d Cir. 1960); *Crews* v. *Commissioner*, 120 F.2d 749 (10th Cir.), cert. denied, 314 U.S. 664 (1941); *Virginia Lincoln Furniture Corp.* v. *Commissioner*, 67 F.2d 8 (4th Cir. 1933). Indeed, it is only in such cases that a further appeal would necessarily be limited to the purpose expressed in Section 7481(a)(3) of "correct[ing the decision] to accord with the mandate." On the other hand, one court of appeals has applied Section 7481(a)(4)'s predecessor to circumstances similar to those here where a rehearing was not ordered, but further proceedings were required on remand. See *McGah* v. *Commissioner*, 210 F.2d 769, 770 (9th Cir. 1954).[6]

The court of appeals' conclusion that it had jurisdiction over respondents' appeal does not warrant review by this Court. Nor is it necessary under 28 U.S.C. 1254(1) for this Court to decide the jurisdictional issue in order to dispose of the case on the statute of limitations issue. See *United States* v. *Augen-*

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[6] The cases cited by respondents in this regard (Br. in Opp. 3-4) are not to the contrary. In neither *Crews* v. *Commissioner*, *supra*, nor *Seiberling Rubber Co.* v. *United States*, 297 F.2d 842 (Ct. Cl. 1962), cert. dismissed, 371 U.S. 801 (1963), does it appear that the appellate mandate required any further proceedings for any purpose other than recomputing the liability in question. (Of course, the decision of the court of appeals in the instant case effectively rejected *Crews* to the extent it might be given any broader reading.) The remaining three cases (*R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225 (1944); *Helvering* v. *Northern Coal Co.*, 293 U.S. 191 (1934); and *Lasky* v. *Commissioner*, 235 F.2d 97 (9th Cir. 1956), aff'd, 352 U.S. 1027 (1957)) stand only for the proposition, with which we agree, that where a decision of the Tax Court has, in fact, become final under the statute, it may not be reviewed by either a court of appeals or this Court.

blick, 393 U.S. 348, 351 (1969). See also *Norton* v. *Mathews*, 427 U.S. 524, 532 (1976); *Secretary of the Navy* v. *Avrech*, 418 U.S. 676, 677-678 (1974). Since we are asking the Court to do no more than hold the petition and to vacate and remand to the court of appeals to allow it to conform its ruling to this Court's decision in *Badaracco* and *Deleet Merchandising Corp.*, no reason appears why the Court need decide the Section 7481 issue, which is not independently worthy of this Court's review.

2. Respondents' second argument (Br. in Opp. 4-6) is that the Commissioner could seek review of the original decision of the court of appeals on the statute of limitations issue under Section 6501 only by filing a petition for a writ of certiorari within 90 days after that decision and, having failed to do so, he may not now seek review of the ruling on the Section 6501 issue. On the contrary, however, as the cases cited in our petition (at 5 n.3) make clear, this Court is empowered to review any issue decided by the court of appeals at any stage of the litigation, whether or not review was sought at the time the question was first decided.[7] Contrary to respondents' contention (Br. in Opp. 6 n.5), this Court's authority to review cases involving multiple appeals does not depend on whether there are "issues in common" between the two appeals[8] or whether a party sought review of is-

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[7] Indeed, even if the Commissioner had petitioned for a writ of certiorari following the first appeal and this Court had denied it, the denial would not preclude subsequent review by this Court. See *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

[8] There is no provision in the Internal Revenue Code for a decision of the Tax Court to become final only in part. See *Cory* v. *Commissioner*, 29 T.C. 903, 907, aff'd, 261 F.2d 702, 704-705 (2d Cir. 1958). Accordingly, the Section 6501(a)

sues decided in both the second and first appeals. See *Urie* v. *Thompson*, 337 U.S. 163, 172 (1949).[9] Accordingly, the question presented in the petition is properly before the Court.[10]

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issue, although distinct from the issues in the second appeal, never became final. Cf. Fed. R. Civ. P. 54(b).

[9] Here, the Commissioner did not file a notice of cross-appeal from the decision entered by the Tax Court on remand, but that failure is no bar to review of the issue by this Court. While it is plainly a "sound practice" for parties planning to seek further review expressly to preserve previously decided issues during the intervening stages of the litigation, this Court has concluded that such actions are not essential in order to obtain review of those issues by writ of certiorari. *Urie* v. *Thompson*, *supra*, 337 U.S. at 172. Nor can respondents claim that they were prejudiced by the Commissioner's action. Since the court of appeals would almost certainly have considered itself bound by its prior decision (see *Baumer* v. *United States*, 685 F.2d 1318 (11th Cir. 1982)), it would have served no practical purpose for the Commissioner to reraise that issue.

[10] Respondents' reliance (Br. in Opp. 5) on *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), as a bar to review by this Court of the Commissioner's petition is plainly misplaced. The question in that case was whether the time for filing a petition for a writ of certiorari commenced to run from the court of appeals' original judgment order of July 5, 1951, or from an amended judgment order entered in the *same* appeal on September 18, 1951 (*id.* at 209). This Court held that the first judgment controlled because it had not been substantially altered in a material way by the second judgment (*id.* at 212). The instant case, however, is wholly unlike *Minneapolis-Honeywell*. The court of appeals' second judgment here involved a *second* appeal taken after a new decision was entered on remand, which resolved legal issues not previously addressed regarding respondents' federal income tax liability for the years in issue. Thus, the time for seeking a writ of certiorari began to run anew from the entry of the judgment in the second appeal in this case.

CONCLUSION

For these reasons and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's disposition of *Badaracco* v. *Commissioner*, No. 82-1453, and *Deleet Merchandising Corp.* v. *United States*, No. 82-1509 and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

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